87-1849

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM OF 1987

GALLOWAY FARMS, INC.

Petitioner,

vs.

PHOENIX MUTUAL LIFE INSURANCE COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

GALLOWAY FARMS, INC.

BY: MARLYN S. JENSEN, P.C.
Route 2
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DATE: _____.

QUESTION FOR REVIEW

DO CONCEPTS OF EQUAL TREATMENT UNDER 28 USC 1915(c), EQUAL PROTECTION AND DUE PROCESS OF AMENDMENTS FIVE OR FOURTEEN DICTATE THAT TIME OF COMMENCEMENT OF EXCLUSIVE FEDERAL COURT JURISDICTION UPON REMOVAL PURSUANT TO 28 USC 1446(e) FOR ONE PROCEEDING IN PAUPERIS RELATE BACK TO THE TIME OF TENDER OF MOTION TO PROCEED IN PAUPERIS TO THE FEDERAL CLERK OF COURT RATHER THAN ACTUAL GRANTING BY THE COURT OF RIGHT TO SO FILE SO THAT TIME OF "FILING" IS THE SAME FOR THOSE ABLE TO PAY AND THOSE PROCEEDING IN PAUPERIS?

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1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being Galloway Farms, Inc. and Phoenix Mutual Life Insurance Co.

TABLE OF CONTENTS

ITEM PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii-iv

PETITION FOR WRIT OF CERTIORARI v

OPINIONS BELOW vi

STATEMENT OF JURISDICTION vii

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED ..... viii-ix

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

MATTERS RAISED IN THE COURT BELOW 3

REASONS WHY WRIT SHOULD BE GRANTED 4

CONCLUSION 10

DECLARATION OF PROOF OF SERVICE 11

APPENDIX 13

TABLE OF AUTHORITIES

ITEM PAGE

UNITED STATES SUPREME COURT

Boddie v. Connecticut, 401 US 371 (1971) 8, 9, 10

Bolling v. Sharpe, 347 US 497 (1954) 9

Coppedge v. United States, 369 US 438, 446 (1962) 10

Georgia v. Rachel, 384 US 780, 797 (1966) 10

Griffin v. Illinois, 351 US 12 (1956) 9

Grubb v. General Electric Credit Corp., 405 US 699 (1972) 8

Ortwein v. Schwab, 410 US 656 (1973) 8

United States v. Kras, 409 US 434 (1973) 8

OTHER FEDERAL COURTS

Barrett v. Southern Railway Co., 68 F.R.D. 413, 418 (D.S.C. 1975) 5

Delavigne v. Delavigne, 530 F2d 598 (4th C.A. 1976) 10

Echevarria v. Silberglitt, 441 F2d 225, 227 (2d C.A. 1971) 10

Fakouri v. Pizza Hut, 824 F2d 470, 472 (6th Cir. 1987) 5, 6

OTHER SOURCES

28 USC 1446, ... 4, 5

28 USC 1915 ..... 1, 4, 6, 7, 8, 9, 10

Fifth Amendment 4, 7, 10

Fourteenth Amendment 1, 3, 4, 7, 9

Phoenix Mutual Life Ins. Co. v. Galloway Farms, Inc 13

U.S. District Court of Iowa,
Southern District Local Rule 1.12 ..... 2, 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

GALLOWAY FARMS, INC.
Petitioner,

vs.

PHOENIX MUTUAL LIFE INSURANCE CO.
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

The Petitioner, Galloway Farms, Inc., requests that a Writ of Certiorari issue to review the opinion of the Iowa Supreme Court, which allowed an Iowa District Court Summary Judgment decision to stand although rendered after a tendered removal to Federal District Court under 28 USC 1446(e) by an indigent, pro se, who petitioned for said removal as a poor person without payment of fees. The Iowa District Court proceeded to hear and rule on a motion for summary judgment after Galloway timely tendered to the Federal Clerk its Petition for Removal with Affidavit of Impecuniosity as required in 28 USC 1915, with accompanying order for the Court to sign; and who further timely gave Notice of Removal to Iowa District Court for Ringgold County prior to State Court hearing. The Federal District Court granted Galloway Farms', Inc.

request to proceed in pauperis four days after Galloway tendered its Petition for Removal, and pursuant to local Rule 1.12, the Federal Clerk then "filed" the Petition, which "filing" was after the Iowa District Court had heard and ruled on the motion for summary judgment.

The Iowa Supreme Court held that the action of the Iowa District Court was appropriate, and that treatment was disparate, no fundamental right was concerned and that rational basis existed.

The matter of equal treatment under the Constitution or statute, or of due process due to one who is indigent and tenders to the Federal Court Clerk a timely Petition for Removal and gives appropriate Notice to the lower Court compared to one who has the money to pay fees upon the tendering of the Petition for Removal is addressed here. More specifically, is State Court jurisdiction ousted upon tender for approval, or upon "filing" following approval of an in pauperis filing?

It appears to Galloway Farms, Inc. this question is one of first impression to this Court.

OPINIONS IN THE COURT BELOW

In spite of the Notice of Removal to Federal District Court filed on March 4, 1985, the Iowa District Court for Ringgold County on March 5, 1985, proceeded to grant Plaintiff's Motion for Summary Judgment.

Following remand from the United States District Court for the Southern District of Iowa, the Iowa Supreme Court entered an order of limited remand to the Iowa District Court based upon the Order granting Summary Judgment of March 5, 1985. No other hearing for Summary Judgment or otherwise was ever held on the merits, other than the March 5, 1985, hearing.

Galloway Farms, Inc. took timely appeal to the Supreme

Court of Iowa, and that Court directly addressed the issue raised here and rendered decision on November 25, 1987, adverse to Galloway Farms, Inc. That opinion is reported as Phoenix Mutual Insurance Company, Inc. v. Galloway Farms, Inc., 415 NW2d 640 (1987), and a copy of that opinion is attached hereto in the Appendix.

Although the Order granting Summary Judgment and the Decree of Foreclosure are directly pertinent, Appellant believes that the opinion of the Iowa Supreme Court adequately defines the issues and facts necessary for review here.

STATEMENT OF JURISDICTION

Jurisdiction of the Iowa District Court was invoked as a farm real estate mortgage foreclosure action under Chapter 654, Code of Iowa. Motion for summary judgment was filed by the Phoenix Mutual Life Insurance Co. pursuant to Iowa Rules of Civil Procedure 237.

Jurisdiction of the United States District Court for the Southern District of Iowa upon removal was invoked pursuant to 28 USC 1446 and 28 USC 1915.

Jurisdiction of the Iowa Supreme Court was invoked under Iowa Appellant Rule 1.

This Court has Jurisdiction to issue a Writ of Certiorari to the Iowa Supreme Court pursuant to 28 USC 1257(3) concerning title, right, privilege or immunity claimed under the Constitution and statute of the United States, and the United States Constitution Amendments Five and Fourteen and the Federal Supremacy Clause, Article Six, Paragraph 2.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Local rule 1.12, adopted by the United States District Court for the Southern District of Iowa provides:

Unless leave to proceed in forma pauperis has been granted, the clerk may require that a party commencing an action in this court, filing a notice of appeal, or removing one from another court, to first pay the statutory fee before the case may be filed, docketed, and process issued thereon.

28 USC 1915(a) provides:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

28 USC 1915(c) provides:

The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

28 USC 1446(e) provides:

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

The Supremacy Clause of the Constitution of the United States of America, Section VI, Paragraph 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Five of the Bill of Rights of the Constitution of the United States of America provide in pertinent part:

No person shall...be deprived of life, liberty or property, without due process of law; ....

Amendment Fourteen, Section 1 of the Constitution of the United States of America provides in pertinent part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURT BELOW

Hearing on motion for summary judgment to grant petition for foreclosure of farm real estate mortgage was set in Iowa District Court for March 5, 1985. On March 4, 1985, Galloway tendered to the Federal Clerk in its district a Petition for Removal and to proceed in pauperis, and gave notice to the State court and parties. Iowa District Court proceeded to render summary judgment on March 5, 1985. Federal Court granted the petition in pauperis on March 8, 1985. Galloway timely appealed to the Iowa Supreme Court, and the matter proceeded there following remand from Federal Court on March 10, 1986. Galloway contended in the Iowa Supreme Court that equal treatment of 28 USC 1915(c) and Section 1 of the Fourteenth Amendment, and due process of that Amendment require that the in pauperis filing relate back to tender of filing to the Federal Court and that the Iowa District Court lost subject matter jurisdiction at that moment rendering the summary judgment void. The Iowa Supreme Court recognized the different treatment but finding no suspect class and a rational basis for differing treatment held the impecunious filing was effective only after accepted. This petition for writ is from that Iowa Supreme Court decision.

B. STATEMENT OF FACTS

Phoenix commenced action against Galloway Farms, Inc. for foreclosure of a farm real estate mortgage on February 23, 1983. Motion of Phoenix on summary judgment or the petition was set for hearing in the Iowa District Court for March 5, 1985. Acting pro se, on March 4, 1985, Galloway filed a resistance to such summary judgment and a "notice of filing petition for removal of civil action", in that Iowa District Court. A copy of "petition for removal of civil action" stating that a petition for removal had been filed in federal district court on March 4, 1985 was attached. On March 5, 1985, the Iowa District Court proceeded with the scheduled oral hearing for summary judgment.

The Iowa District Court was fully aware of the filing in Federal Court, as is shown by excerpts from its statements in the transcript of the March 5, 1985, hearing on Summary Judgment:
"THE COURT: ... It's my understanding of Federal Rules that they have to grant your petition to remove the District Court." [Transcript page 3, lines 7-10].
THE COURT: ... Your filing that is not going to deprive this Court of jurisdiction like a filing of a bankruptcy petition will stay proceedings in the District Court. We are stopped in our tracks whenever that occurs. A filing for a petition for removal will not stop this proceeding until the case is removed or jerked out of our hands, so we are going to proceed with today's hearing...". [Transcript page 5, lines, 9-16].
"THE COURT: ... Let the record show that we have had a discussion at side bar that I think may have been partially reported or not concerning the notice being given to this District Court in a petition for removal that has been filed with the Federal Court here in our state, the Southern District I presume. Did you file that up in Des Moines, sir?
MR. GALLOWAY: Yes, I did." [Transcript page 5, lines 18-25].
"THE COURT: ...This Court is of the opinion that until the Federal Court grants the petition to remove this District Court has jurisdiction to proceed in these proceedings and that until the Federal Court accepts this petition to remove this Court is obliged and obligated and has no choice but to proceed further here in this case." [Transcript page 6, lines 12-17].

At the conclusion of that hearing the Iowa District Court granted the motion for summary judgment, and ordered Phoenix to prepare a decree. Prior to the submission of such decree, Galloway gave notice of appeal to the Iowa Supreme Court.

Local rule 1.12 of the U.S. District Court of Iowa directs the Federal Clerk not to file a removal petition until the fee is paid and the bond has been posted. The Galloway petition to proceed in pauperis was allowed by the Federal District Judge on March 8,

1985, and on March 11, 1985, order was filed. The matter was remanded to Iowa State Court after a hearing in the Federal District Court on March 10, 1986, and proceeding resumed in the Iowa District Court.

Phoenix contends the removal was effective on March 11, 1985. Galloway contends that 28 USC 1915(c) and the Fourteenth Amendment equal protection and due process provisions require that an in pauperis filing must relate back to the time of tender to the Federal Clerk. If Phoenix is correct, the Iowa Court had subject matter jurisdiction to proceed with the summary judgment hearing. The Iowa Supreme Court so held. Galloway contends that although the technical "filing" may have been done on March 11, 1985, to afford equal treatment under the law for those impoverished, once the in pauperis is accepted by the Court it must relate back to the time of tender and the Iowa Court lacked subject matter jurisdiction to render summary judgment. The Iowa Supreme Court rejected this and found rational basis for such different treatment, and because there is no suspect class involved, that such was permissible.

On March 5, 1985, Galloway assumed that its actions had removed exclusive subject matter jurisdiction to the Federal Court and made very limited resistance to the motion for summary judgment. The purported summary judgment hearing of March 5, 1985, is the only one which was ever held. Galloway contends it was held by a court lacking subject matter jurisdiction and that it is therefore void.

MATTERS RAISED IN THE COURT BELOW

Notice of Removal was filed in the Iowa District Court the day prior to hearing for Summary Judgment. The Court knew of the removal because it was discussed at length as shown in the Transcript. In spite of that knowledge, the Iowa Trial Court proceeded with hearing on Summary Judgment.

Appellant's Brief of Galloway asserted to the Iowa Supreme

Court that the Iowa District Court lacked subject matter jurisdiction because of the filing of the removal petition in Federal Court. Appellee Brief of Phoenix answered that the actual "filing" was not accomplished under Federal Local Rule 1.12 until after the summary judgment hearing because the Federal Court did not approve the in pauperis application until such time. Galloway in its Reply Brief asserted the equal treatment and Federal supremacy. Later Galloway, also, filed Supplemental Brief addressing such matters

REASONS WHY THE WRIT SHOULD BE GRANTED

DO CONCEPTS OF EQUAL TREATMENT UNDER 28 USC 1915(c), EQUAL PROTECTION AND DUE PROCESS OF AMENDMENTS FIVE OR FOURTEEN DICTATE THAT TIME OF COMMENCEMENT OF EXCLUSIVE FEDERAL COURT JURISDICTION UPON REMOVAL PURSUANT TO 28 USC 1446(e) FOR ONE PROCEEDING IN PAUPERIS RELATE BACK TO THE TIME OF TENDER OF MOTION TO PROCEED IN PAUPERIS TO THE FEDERAL CLERK OF COURT RATHER THAN ACTUAL GRANTING BY THE COURT OF RIGHT TO SO FILE SO THAT TIME OF "FILING" IS THE SAME FOR THOSE ABLE TO PAY AND THOSE PROCEEDING IN PAUPERIS?

Issues raised in this case appear to be of first impression, and center upon the exact time that jurisdiction upon removal is first exclusively reposed in the Federal Court. In this case Galloway Farms, Inc. tendered to the Federal Clerk a petition to remove a State Court farm real estate mortgage foreclosure proceeding and, lacking funds to post the bond and pay the costs, made application to file in pauperis. There appears to be no question that these forms were in order. The Federal Clerk under the local rule did not "file" the petition to remove but awaited action of the Federal Judge as to whether or not to grant the in pauperis request. Galloway immediately gave notice to the State Court that

the petition had been "filed", adequately noticing the State Court of the tender of the removal petition but stylizing it as having been "filed". In the face of this, the State Court proceeded to hold a summary judgment hearing the only summary judgment hearing ever held - and in light of due process requirements - the hearing Constitutionally essential to validity of the ultimate decree. Several days following the summary judgment hearing in state court the Federal District Court Judge granted the in pauperis filing, and the petition was formally "filed". On its face the issue centers upon whether or not the "filing" in pauperis under the federal rule is effective when tendered to the Federal Clerk originally or is effective only when the Federal Court approves the "filing" and allows it to be placed on the docket.

28 USC 1446 provides that federal jurisdiction begins when a petition to remove is filed following payment of the fee and posting of the bond. It has been held that the petition itself initiates the action and that the bond is not essential to jurisdiction. Fakouri v. Pizza Hut, 824 F2d 470, 472 (6th Cir. 1987). Federal and State Court jurisdiction at that point are apparently concurrent. At such time as the notice of removal is filed in the State Court and the adverse parties are given notice the State Court jurisdiction is ousted and exclusive federal jurisdiction begins. See, Barrett v. Southern Railway Co., 68 F.R.D. 413, 418 (D.S.C. 1975).

The foregoing assumes a removal petitioner with adequate funds to pay the filing fee and to post the bond. Galloway did not have money to pay the filing fee or to post the bond, and filed the petition to proceed in pauperis which was ultimately granted (after the hearing for summary judgment in State Court). The notice was given to the State Court and adverse parties of such "filing" in the Federal Court. Had Galloway paid the filing fee and posted the bond, it seems clear State Court jurisdiction would have ended prior to summary judgment hearing. The question then hinges upon whether or not the removal in pauperis was effective only upon ultimate "filing" following court approval, or whether such filing when approved relates back to the time of initial tender to the

Federal Clerk.

Closer examination of the matter discloses further need for inquiry. If the Iowa Supreme Court is correct and the effective time of filing of the petition to remove is upon formal "filing" following approval of the Federal District Court, it then becomes clear that there is different treatment of those filing in pauperis and those paying and posting. Arising from that observation is the question as to WHO did such classification. It appears that the classification is done by the local federal rule, but with such federal classification having direct state impact.

Further question arises as to which federal law controls — ie., does the final portion of 28 USC 1915(c), providing that in in pauperis cases "the same remedies shall be available as provided for by law in other cases", mandate equal treatment from the moment of tender to the federal court? Or is the matter one of Constitutional equal protection or due process, and in the event it is, is it a state classification controlled by the equal protection and due process provisions of the Fourteenth Amendment? Or does it relate to a federal classification under the Fifth Amendment Due Process Clause which by implication requires equal protecting?

In addressing the question of equal treatment, the issue centers on whether there is a classification wherein those with a fundamental right of access to the federal courts have been given disparate treatment and denied equal protection?

It would seem of paramount importance to note that the question is NOT whether or not Galloway would be allowed to file in pauperis. The Federal Court decided that Galloway would. The question is AT WHAT TIME was the removal "filing" effectual to divest the State Court of subject matter jurisdiction. Whether or not Galloway could file in pauperis has been determined. The question is, was the "filing" effectual only when approved by the Federal Court or did it relate back to the initial tender to the Federal Clerk for filing upon approval.

In viewing the situation in light of balancing relative interests there are three interests to be advanced. The Federal Courts,

in light of the removal statute evidencing Congressional policy, would appear in favor of the approval of the in pauperis filing relating back to the time of tender to the Federal Clerk. Galloway's interest would appear to coincide with that of the federal interest in this regard. The State Court interest appears to be that such in pauperis removal be effective for ouster of State Court jurisdiction only upon filing in the Federal Court following Federal Court approval of the in pauperis petition. The Iowa Court so found and rationalized such disparate treatment as necessary or permissible to protect litigants from potential abuses and frivolous removals. In the context of the foregoing, it appears that the situation involves a federal classification with resulting disparate state treatment.

The Iowa Court found a rational justification for the rule in that if a removal petition were deemed to be filed when tendered, insincere defendants could stall by filing frivolous removals. The Iowa Court found this to be a rational basis for refusal to treat the removal as effectual when tendered. Galloway would assert that such drastic methods of preventing such abuse of removal is not permissable under Section 1915(c), equal protection or due process concepts. There are other adequate remedies to prevent such actual abuse.

More importantly, it would appear that this is a situation involving federal supremacy. The determination as to the effectual time of removal is one for federal, and not state, determination. The interest to be advanced is the federal interest enunciated by the Congress in allowing State actions to be removed in pauperis, and implying if not stating directly, that equal treatment is to be afforded those in pauperis. In light of this policy and in light of the supreme federal interest it would seem that removal should be effectual upon tendering to the Federal District Court. This would guarantee that those impoverished seeking access to the federal courts are treated equally with those with funds for paying and posting. The Federal Court ruled that Galloway WAS ENTITLED to proceed in pauperis. A state court ruling that such allowance is not effective until "filed" following federal order effectively thwarts

that removal and the policy and purpose of the supreme federal rule. See, Grubb v. General Electric Credit Corp., 405 US 699 (1972).

The ruling of the Iowa Court making the removal effective only upon approval by the Federal Court places the indigent defendant adrift in a melieu in which his rights depend upon how readily accessible a federal judge is to rule upon his in pauperis filing. Due process and equal protection requirements would seem to point that the rights of an indigent should not be predicated upon such uncertain and fortuitous determinations. Allowing the approval to relate back to the time of tender removes such fortuity.

The Iowa Court states that the burden is upon the moving party to show compliance with the statutory removal requirements and that doubts must be resolved against federal jurisdiction. The court further found that grounds and removal procedure should be strictly construed in favor of state court jurisdiction. It is the position of Galloway that such observations do not address the true issue here. The question here is NOT whether or not removal should be granted. That was adjudicated by the Federal Court in favor of Galloway. The question before the Court was the effective time of the removal by Galloway.

Boddie v. Connecticut, 401 US 371 (1971), concerned indigent welfare recipients who sought to file divorce action in State Court without paying the filing fee. This Court found that State monopolization of means of legally dissolving the marriage relationship under due process prohibits the state from denying solely because of inability to pay access to its courts of individuals who seek dissolution of their marriage. In United States v. Kras, 409 US 434 (1973), this Court found that an indigent was not entitled the same Constitutional protections in regard to payment of fees to obtain a discharge in bankruptcy. In Ortwein v. Schwab, 410 US 656 (1973), the Court found that the filing fee prerequisite to a judicial review of administrative denial of welfare did not have a Constitutional significance of the magnitude of the Boddie applicants, and found that indigents were not a suspect classification. In

Griffin v. Illinois, 351 US 12 (1956), this Court found that in the criminal context denial of a free transcript to indigent defendants did violate the Fourteenth Amendment guarantees to equal protection of the law.

In the case at hand, Galloway Farms, Inc. was seeking removal from State Court jurisdiction to the federal forum. Such removal for consideration in the federal forum was granted. However, the local federal rule required that the removal would not be "filed" until such time as the Court had approved the in pauperis request. The question then becomes a matter of whether such acceptance by the Federal Court relates back to the time of the original tender to the Federal Clerk or is effective only upon actual filing and docketing. Those cases relating to filing of state fees are not directly pertinent but somewhat enlightening. Galloway sought the intervention of the Federal Court jurisdiction but lacked funds to effect such removal. Galloway, being a defendant in a farm mortgage foreclosure action, had no recourse to obtain Federal Court jurisdiction other than through removal. Removal in pauperis was granted by the Federal Court which allowed the formal filing and docketing of the removal petition. The State Court was timely notified. Federal supremacy would dictate that that removal should have been effective from the time of initial tender to the Federal Court. Although the refusal to file the tendered petition is a federal rule rather than a State rule, the resulting disparate treatment as to those effected by it would dictate that equal treatment demand such relation back.

Equal protection concepts implied under the Fifth Amendment under Bolling v. Sharpe, 347 US 497 (1954), or under the equal protection provisions of the Fourteenth as under Boddie v. Connecticut, supra, should apply. However, resort to Constitutional requirements of equal treatment may not be necessary. The final portion of 28 USC 1915(c) appears to require that equal remedy be granted to indigents. Therefore, it would appear that the result of equal treatment can be resolved without recourse to Constitutional mandate, but can be predicated from the language of the

Act itself.

As the Iowa Court observed, arising from Coppedge v. United States, 369 US 438, 446 (1962) it is required to afford equal treatment to every litigant before the bar. Substantial compliance with the removal procedures effects the removal. See, e.g. Delavigne v. Delavigne, 530 F2d 598 (4th C.A. 1976). Galloway completed the filing within the bounds of its ability and did substantial compliance for removal. Because such removal divests the State Court of jurisdiction to proceed further, regardless whether removal was proper, as provided in Echevarria v. Silberglitt, 441 F2d 225, 227 (2d C.A. 1971), the State Court lost its subject matter jurisdiction upon notification and no valid summary judgment hearing was ever held. See, Georgia v. Rachel, 384 US 780, 797.

Galloway tendered a removal petition in pauperis which was allowed by the Federal Court. The Iowa State Court has ruled in a manner which effectively eviserates such removal, for the merits were finally adjudicated in State Court while Galloway awaited that Federal Court approval.

For these reasons a Writ of Certiorari should be granted by this Court, to correct such errors made below.

CONCLUSION

Galloway Farms, Inc. respectfully requests this Court to issue Writ of Certiorari to the Iowa Supreme Court to correct its decision in such matter reported as Phoenix Mutual Life Insurance Co. v. Galloway Farms, 415 NW2d 640 (Iowa 1987), and to order that the Iowa District Court had been ousted of subject matter jurisdiction on March 5, 1985, that the summary judgment hearing of said date is invalid, and for such relief as arises in the premises.

Respectfully submitted this day of _____, 1988.

Galloway Farms, Inc.

Marlyn S. Jensen, P.C.

By: _____

Marlyn S. Jensen, P.C.

Route 2
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Telephone (515) 342-3530

ATTORNEY FOR PETITIONER

DECLARATION OF PROOF OF SERVICE

I, Marlyn S. Jensen, counsel for Galloway Farms, Inc., under 28 USC 1746, do affirm and declare that a copy of the foregoing Petition and attached Appendix, as corrected, was served on Terry Giebelstein, Attorney for Phoenix Mutual Life Insurance Co., 600 Davenport Bank Building, Davenport, Iowa 52801, by depositing such copy in a United States postal mailbox, with first-class postage prepaid in accordance with Rule 28.3 and Rule 28.4(a) of the Rules of the Supreme Court of the United States.

I affirm that the foregoing is true and correct.

_____

Marlyn S. Jensen

Subscribed and sworn to before me, a Notary Public, on this ____ day of_____ , 1988, by the above named Marlyn S. Jensen, who is personally known to me to be the same person who has affixed his signature.

_____

NOTARY PUBLIC.

APPENDIX

415 NORTHWEST REPORTER, 2d SERIES, Page 640

PHOENIX MUTUAL INSURANCE COMPANY, INC., Appellee,

v.

GALLOWAY FARMS, INC., Appellant.

No. 85-388

Supreme Court of Iowa.

Nov. 25, 1987.

Appeal was taken from order of the District Court, Ringgold County, Michael J. Streit, J., foreclosing farm mortgage. The Supreme Court, Harris, P.J., held that tendering to federal court of petition to remove and to proceed as poor person did not stay state court proceedings until the petition was filed upon clerk's receipt of order of federal court granting the petition to proceed in forma pauperis.

Affirmed.

1. Appeal and Error Key 763

Assignment of error addressing action of trial court prior to taking of appeal could not be raised for the first time in supplemen-

tal brief.

2. Removal of Cases Key 107(7)

Burden is with moving party to show compliance with statutory removal requirements, and doubts of propriety of removing must be resolved against federal jurisdiction. 28 USCA 1446.

3. Removal of Cases Key 95

Removal divests state court of jurisdiction to proceed further with the removed matter, regardless of whether removal was proper.

4. Removal of Cases Key 84, 88, 89(1)

Removal to federal court is normally effected by filing with federal court petition for removal accompanied by removal bond, giving notice to all adverse parties, and filing copy of petition for removal with clerk of state court; substantial compliance with those provisions will effect removal.

5. Removal of Cases Key 95

State court proceedings are not stayed on date the petition to remove and to proceed as a poor person is tendered to federal court. 28 USCA 1446.

6. Constitutional Law Key 249(6)

Removal of Cases Key 95

There is rational justification for rule that tendering of petition for removal and motion to proceed as poor person in federal court will not stay state court proceedings until motion to proceed

in forma pauperis is granted, and rule does not deny equal protection to poor persons.

7. Constitutional Law Key 312(1)

Removal of Cases Key 95

There was no due process violation in rule that state court proceedings are not stayed by tendering of motion for removal of federal court until accompanying motion to proceed in forma pauperis has been granted where removal petition was filed with district court immediately upon grant of petition to proceed in forma pauperis. 28 USCA 1446(e).

Marlyn S. Jensen, Osceola, for appellant.

Terry M. Giebelstein, Lane & Waterman, Davenport for appellee.

Considered by HARRIS, P.J., and LARSON, SCHULTZ, LAVORATO, and NEUMAN, JJ.

HARRIS, Presiding Justice.

The trial court granted summary judgment in this action, ordering foreclosure of a farm mortgage. At the time of the challenged ruling the debtor had sought to petition for removal to federal court. The question is whether the removal had been effected, thus depriving the trial court of jurisdiction to proceed. We think it had not, and hence affirm.

Plaintiff Phoenix Mutual Life Insurance Company holds a promissory note and mortgage on a farm owned by defendant corporation. On February 23, 1983, Phoenix brought this foreclosure action against Galloway and other defendants who hold lien

interest. On February 4, 1985, Phoenix filed a motion for summary judgment which was set for oral submission on March 5, 1985.

On March 4, 1985, Galloway filed a resistance to the summary judgment motion and on the same day filed a "notice of filing petition for removal of civil action" with an attached "petition for removal of civil action," stating that a petition for removal had been filed in federal district court on March 4, 1985. On March 5, the trial court proceeded with the scheduled oral hearing on Phoenix's motion for summary judgment. The motion was granted and the court ordered counsel for Phoenix to draft and present a decree incorporating its findings. On March 8, before Phoenix's counsel could present a written decree for the court's signature, Galloway filed a notice of appeal to us.

According to the certified records from federal court, on March 4, Galloway filed a "motion to file petition to remove and proceed as a poor person" with an attached "affidavit of impecuniosity" with that court. On March 8 the federal court signed and on March 11 filed an order allowing Galloway to proceed without the prepayment of costs or fees. Also on March 11, Galloway's petition for removal of the civil action was filed by the clerk of the federal district court.

On May 31, 1985, Phoenix filed in federal court a motion to remand the case to the Iowa district court. By order dated January 31, 1986, and filed February 4, 1986, the federal district court sustained the motion to remand. On February 19, 1986, Galloway filed a motion for reconsideration of the remand to state court. That motion was denied by the federal court. On March 10, 1986, the clerk of the federal court returned the file, including the orders of the federal court, to the Iowa district court.

I. Under Iowa rule of appellate procedure 12(g) we may remand a "cause to the trial court, which shall have jurisdiction for

such specific proceedings" as we direct. Acting pursuant to that rule on July 7, 1987, we remanded the case to the district court "for the limited purpose of permitting that court to enter a written ruling granting plaintiff's motion for summary judgment, the entry of a judgment and decree of foreclosure and enforcement proceedings ...."

On October 5, 1987, seven days prior to the date the appeal had been set for oral submission, Galloway filed what were denominated a supplemental appendix and supplemental brief. Phoenix has moved to strike them, asserting they raise matters and assign error outside the issues which had been established in the briefs.

Galloway resisted the motion to strike, stating that additional issues were generated upon the limited remand. According to Galloway, Phoenix's remedy is not to call for striking the supplemental filings, but merely to be accorded time to respond to them.

[1] We do not agree. The remand was carefully limited; jurisdiction was returned to the district court to allow the paperwork to be completed on the previously ordered foreclosure. The new assignment of error, appearing in the recently filed briefs, does not, as Galloway contends, address matters which occurred upon remand. Rather it addresses the action of the trial court prior to the taking of the appeal. It comes too late. We have many times held that an issue cannot be asserted for the first time in a reply brief. See e.g., Brown v. First Nat'l Bank of Mason City, 193 N.W.2d 547, 551, 52 A.L.R.3d 728, 734 (Iowa 1972). Phoenix's motion to strike Galloway's supplemental brief is sustained.

[2] II. Was removal to federal court accomplished when Galloway filed a "motion to file petition to remove and proceed as a poor person" and a "notice of filing petition for removal of civil action"? The controlling federal statute is 28 USC section 1446

(1977) which in relevant part provides:

> (d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.
>
> (e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded.

Federal law controls the removal process. Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 705, 92 S.Ct. 1344, 1348-49, 31 L.Ed.2d 612, 619 (1972). The burden remains with the moving party to show compliance with the statutory removal requirements, and doubts of the propriety of removal must be resolved against federal jurisdiction. Maybruck v. Haim, 290 F.Supp. 721, 724 (S.D.N.Y. 1968). Grounds and procedure of removal should be strictly construed in favor of state court jurisdiction. Viles v. Sharp, 248 F.Supp. 1019, 1021 (W.D.Mo. 1965).

[3, 4] Removal divests the state court of jurisdiction to proceed further with the removed matter, regardless of whether removal was proper. Echevarria v. Sibberglitt, 441 F.2d 225, 227 (2d Cir. 1971). Removal to federal court is normally effected by filing with the federal court a petition for removal accompanied by a removal bond, giving notice to all adverse parties, and filing a copy of the petition for removal with the clerk of the state court. See Berberian v. Gibney, 514 F.2d 790 (1st Cir. 1975). Substantial compliance with those procedures, however, will effect removal. See e.g., Delavigne v. Delavigne, 530 F.2d 598 (4th Cir. 1976)

(Where defendant filed a petition for removal with the federal court and gave notice to the state court and to the adverse party, removal was effected even though defendant neglected to file a copy of the petition for removal with the state court); Adair pipeline Co. v. Pipeliners Local Union, 203 F.Supp. 434 (S.D.Tex. 1962) (Removal is effected when state court judge is handed a copy of the petition for removal, the original of which had been filed in federal court, even though the copy of the petition for removal was not filed with the clerk of the state court.), aff'd, 325 F.2d 206 (5th Cir. 1963).

The removal prerequisite in issue here is whether Galloway's removal petition should be deemed filed on the date the petition to remove and to proceed in forma pauperis was submitted to the federal court.

28 USC section 1914(a)(1978) requires the clerk of each federal district court to collect a $120 fee from the party instituting any suit, whether by original process or removal. Local rule 1.12, adopted by the United States District Court for the Southern District of Iowa, provides:

> Unless leave to proceed in forma pauperis has been granted, the clerk may require that a party commencing an action in this court, filing a notice of appeal, or removing one from another court, to first pay the statutory fee before the case may be filed, docketed, and process issued thereon.

28 USC section 1915(a), entitled "proceedings in forma pauperis," allows the federal court to authorize the commencement of an action, without the prepayment of fees or costs (or security therefore), by a person who makes affidavit that he or she is unable to pay the costs (or give security). A person proceeding in forma pauperis under section 1915 is relieved from the section 1446(d) requirement of posting a removal bond. Pasquarella v. Santos, 416 F.2d 436, 437 (1st Cir. 1969).

As mentioned, on March 4, 1985, Galloway filed in federal

court its motion to remove and to proceed as a poor person. Pursuant to the local federal rule, however, the federal clerk did not file the removal petition until after the federal judge's March 8 order allowed Galloway to proceed without prepayment of costs or fees. Accordingly, Galloway's petition was not filed until March 11, six days after the summary judgment hearing and foreclosure ruling in state court.

[5] But Galloway contends state court proceedings are stayed on the date the petition to remove and to proceed as a poor person is tendered to the federal court. Any other rule, the argument goes, would deny indigents equal protection of the laws, as well as due process.

It is our duty to assure, to the greatest degree possible, equal treatment for every litigant before the bar. See Coppedge v. United States, 369 U.S. 438, 446-47, 82 S.Ct. 917, 921-22, 8 L.Ed. 21, 29 (1962). Because we are not concerned here with a suspect class or with a fundamental right there is no equal protection violation if there is a rational justification for the rule that removal will not be effected until the petition to proceed in forma pauperis has been approved. See Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973).

There is rational justification for the rule. Local rule 1.12 directs clerks not to file the removal petition until the bond has been posted. If the removal petition were deemed filed on the day the petition to remove and to proceed in forma pauperis was submitted to the federal court, defendants unwilling to post the bond could stall for time just by filing one, even a frivolous one.

[6,7] Similarly, persons of financial means who merely wish time to obtain the bond money could stay the state court proceedings a few days earlier by filing a frivolous petition to proceed in forma pauperis. In order to prevent abuses of the rule

it is rational to await the granting of the petition to proceed in forma pauperis before the removal petition can be filed. Since there is a rational justification for the rule, persons who petition the court to proceed in forma pauperis are not denied equal protection of the laws. [Footnote 1]

III. We find it unnecessary to detail two other assignments which become moot by what we have said. Galloway contends the formal judgment of foreclosure, entered July 16, 1987, following remand for that purpose could not have been based on the record existing March 5, 1985, when the trial court found it should be entered. We find no support for such a conclusion. It is now clear that Phoenix was entitled to foreclosure on either the earlier or later date. The assignment is without merit.

We have not overlooked Galloway's request that we reconsider a ruling entered by our court on May 7, 1987, denying a motion to abate the action and suspend the rules. The motion was based on the absence in state court of copies of the federal court order